UNITED STATES

v.

LOYD RAMSTAD and EDITH RAMSTAD

A-30351 Decided SEP 24 1965

Mining Claims: Discovery--Mining Claims: Common Varieties of Minerals

To satisfy the requirement for discovery on a placer mining claim located for common varieties of sand and gravel before July 23, 1955, it must be shown that the materials within the limits of the claim could have been extracted, removed, and marketed at a profit before that date, and where the evidence shows that prior to that date no sales had been made from the claim, even though sand and gravel of like quality was being sold in the vicinity, and there was no bona fides in development of the claims the mining claim is properly declared null and void.

Mining Claims: Common Varieties of Minerals

Sand and gravel suitable for road base, asphalt-mix and concrete aggregate without expensive processing but which are used only for the same purposes as other widely available, but less desirable, deposits of sand and gravel are common varieties of sand and gravel and not locatable under the mining laws since these facts do not give them a special, distinct value.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

A-30351 : Nevada Contests 3323 and 3324

United States : Sand and gravel placer mining
v. : claims held null and void
Loyd Ramstad and Edith Ramstad
: Affirmed

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Loyd and Edith Ramstad have appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, dated July 22, 1964, which affirmed a decision of a hearing examiner, dated November 25, 1963, declaring the Little David and David Nos. 2 and 5 sand and gravel placer mining claims null and void.

The appellants filed applications for patent N-058441 for the Little David and David No. 5 claims on May 4, 1962, and N-058442 for the David No. 2 on May 7, 1962.

On November 29, 1962, the Reno land office instituted contest proceedings Nos. 3323 and 3324 against the claims, alleging in the complaint as amended that:

"1. Minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery.

2. No discovery of a valuable mineral has been made within the limits of the claims because the mineral materials present cannot be marketed at a profit and it has not been shown that there exists an actual market for these materials."

A hearing was held on the charges on June 6 and August 5, 1963, which covered all three claims. In his subsequent decision of November 25, 1963, the hearing examiner held all the claims invalid and rejected the applications for patent, finding that the claimants had not established that prior to July 23, 1955, the sand and gravel on the claims could have been extracted, removed and marketed at a profit, or even that it could compete in the local market. On appeal, the Office of Appeals and Hearings affirmed, finding that the sand and gravel was a "common variety" of sand and gravel within the meaning of section 3 of the act of July 23, 1955, 69 Stat. 368, as amended, 30 U.S.C.

§ 611 (1964),[1] and that the claimants had not proved that the sand and gravel on the claims could have been extracted and removed at a profit prior to July 23, 1955.

On appeal, claimants allege that they developed their claims sufficiently to render their patent applications valid, that they had shown there was a demand for sand and gravel from the claims prior to July 23, 1955, and that the product could have been marketed at a profit in the period from the location of the claim through July 23, 1955, that the denial of a business license by a local governmental authority was sufficient grounds for appellants to withhold attempts to market the material on their claims, and that they presented enough evidence to show that an attempt to market the materials was made during the period prior to July 23, 1955.

The law governing the validity of sand and gravel placer mining claims is well established:

> "The statute [mining law] says simply that the mineral deposit must be 'valuable.' Rev. Stat. § 2319, 30 U.S.C.A. § 22. Where the mineral in question is of limited occurrence, the Department, with judicial approval, has long adhered to the definition of value laid down in Castle v. Womble, 19 I.D. 455, 457 (1894):
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> > '[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."
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> With respect to widespread non-metallic minerals such as sand and gravel, however, the Department has stressed the additional requirement of present marketability in order to prevent the misappropriation of lands containing these materials by persons seeking to acquire such lands for purposes other than mining. Thus, such a 'mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit.'

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1/ Amended by the act of September 28, 1962, 76 Stat. 652, in details immaterial to this consideration.

Layman v. Ellis, 54 I.D. 294, 296 (1933), emphasis supplied. See also Estate of Victor E. Hanny, 63 I.D. 369, 370-72 (1956)." Foster v. Seaton, 271 F. 2d 836, 838 (D.C. Cir. 1959).

Furthermore, it must be shown that the sand and gravel are of a quality acceptable for the type of work being done in the market area and that the extent of the deposit is such that it would be profitable to extract it. United States v. Keith J. Humphries, A-30239 (April 16, 1965); United States v. Charles H. and Oliver M. Henrikson, 70 I.D. 212 (1963), affirmed Henrikson v. Udall, 229 F. Supp. 510 (N.D. Calif. 1964), appeal pending.

In addition, since the claims were located prior to July 23, 1955, the date on which deposits of common varieties of sand and gravel were removed from the category of valuable mineral deposits locatable under the mining laws, the claimants must establish either that they made a discovery prior to July 23, 1955, or that the material on the claims includes deposits which are valuable because they have some property giving it a special and distinct value. United States v. Keith J. Humphries, supra.

Turning to the facts of the case, we find that the Little David claim was located on January 16, 1951, and that the David Nos. 2 and 5 were located on June 11, 1951; that they are 15½ miles northwest of the center of Las Vegas on U.S. highway 95 (June Tr. 8, 9-10)[2/]; that no material has been removed from the claims (June Tr. 16); that the sand and gravel on the claims is similar to that in the surrounding area and is the type used as crushed gravel for road base material, asphalt mix, and as concrete aggregate (June Tr. 14, 15, August Tr. 9, 10, 15-17, 44-45, 63, 79, 92); and that there was a market for sand and gravel in the Las Vegas area in the period 1951 - 1955 (August Tr. 60, 80). It also appears that all of the sales of sand and gravel in the area were made by pits that were already in production (August Tr. 70, 88), that the pits in operation in 1951 - 1955 could supply all the demand (August Tr. 89), and that the contestees' witnesses who said there would have been a market for the sand and gravel on appellants' claims qualified their statements by adding that it would have been necessary to have a plant in operation before they would have made any purchases (August Tr. 70-71, 74, 80, 83, 88).

Whether such a generalized demand without any sale at a profit from the particular claim is sufficient to validate sand and gravel claims in the Las Vegas and other areas undergoing rapid growth has been before the Department many times. In United States v. Everett Foster et al., 65 I.D. 1 (1958), affirmed Foster v. Seaton, supra, the Department

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2/ This and similar references are to the transcripts of the hearings.

held invalid two such sand and gravel claims in sec. 29, T. 22 S., R. 61 E., M.D.M., located 13 miles south of Las Vegas, stating:

> "Although the contestees had held these claims for over 3 years at the time of the hearing, they had not been able to dispose of any material from the claims, even in what they urged was an expanding market. While the fact that no sale had been made at the time of the hearing is not controlling in itself, yet it is persuasive that certain factors must have been involved which prevented the sale. If the deposits were of acceptable quality and existed in such a quantity as to make the extraction worthwhile, then if the demand were there the contestees should have been able to dispose of the material at a profit. On the other hand, if the market was such that it would not pay to extract the material and haul it to that market, then it cannot be said that the deposits from these claims meet the test of discovery for sand and gravel claims under the mining laws." 65 I.D. at 7-8.

In affirming the Department the court held:

> "Particularly in view of the circumstances of this case, we find no basis for disturbing the Secretary's ruling. The Government's expert witness testified that Las Vegas valley is almost entirely composed of sand and gravel of similar grade and quality. To allow such land to be removed from the public domain because unforeseeable developments might some day make the deposit commercially feasible can hardly implement the congressional purpose in encouraging mineral development." Foster v. Seaton, supra, at 838.

In United States v. Clear Gravel Enterprises, A-27967, and United States v. The Dredge Corporation, A-27970 (December 29, 1959), the Department held invalid some 30 sand and gravel claims located in T. 20 S. and T. 21 S., R. 60 E., M.D.M., in an area from 5 to 8 miles west of Las Vegas. Again in United States v. The Dredge Corporation A-28022 (December 18, 1959), the Department held invalid 8 association sand and gravel placer claims of 160 acres each encompassing the whole of sections 5 and 8, T. 20 S., R. 60 E., M.D.M., citing Foster v. Seaton, supra.3/ The claims in these three cases were located much

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3/ The Dredge cases were affirmed in The Dredge Corporation v. Palmer et al., Civil No. 366, and The Dredge Corporation v. Penny et al., Civil No. 396, in the United States District Court for the District of Nevada, September 25, 1962; reversed and remanded on another ground, 338 F. 2d 456 (9th Cir. 1964).

closer to the center of Las Vegas than the claims under consideration.

Two years later in United States v. R. B. Borders et al., A-28624 (October 23, 1961), the Department held invalid similar sand and gravel claims located in sec. 32, T. 22 S., R. 61 E., M.D.M., Nevada, again citing Foster v. Seaton, supra. Upon review, the Department was affirmed in a decision holding:

> "* * * The appropriation under the mining laws of non-metallic substances has caused burdensome problems. The Bradford claims were located for sand and gravel in Las Vegas Valley, Clark County, Nevada, containing unlimited deposits of this material for which in excess of 800 mining claims had been filed, encompassing 100,000 or more acres."

The court then cited Foster v. Seaton, supra, and continued:

> "If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary * * *. But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.
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> * * * Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of credible evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the

> Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of Foster v. Seaton (supra) by proving bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely." Osborne v. Hammitt, Civil No. 414, in the United States District Court for the District of Nevada (August 19, 1964), appeal pending.

As the Department recently said in holding other sand and gravel claims invalid:

> "These observations of the court are directly pertinent to the situation here. We have two claims from which the claimant has not removed and sold a shovelful of sand or gravel since he located the claims. Although three of contestee's witnesses testified that there was a market for sand and gravel prior to July 23, 1955 (Tr. 110, 130, 158), only one specifically gave his opinion that sand and gravel could have been mined from contestee's claims at a profit at that time (Tr. 159). This is the type of speculative hypothetical, and theoretical testimony to which the court gave little credence in the Osborne case. There was no showing in this proceeding that there was an unfulfilled demand for sand and gravel in the Las Cruces area, that there was a market that could not be supplied from an existing operation. In short, there is no evidence that a market existed for the sand and gravel on the Caliche claims prior to July 23, 1955, assuming that sand and gravel existed on the claims in sufficient quantities to warrant development."4/

Furthermore, as the hearing examiner found, the appellants had not done anything to prepare the sand and gravel on the claims for market. The most that they asserted is that they had scraped a few cuts of

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4/ United States v. Keith J. Humphries, supra, where the claims were located on a highway four miles northeast of Las Cruces, New Mexico, on an alluvial fan extending 60 to 100 miles and were within 200 feet to a half mile of three large operating pits, but where no sales had ever been made from contested claims.

3' x 6' x 30' and piled up the displaced materials.5/ They did not have equipment to remove the deposits and to process them and they had not had tests conducted to establish the quantity and quality of the gravel until shortly before the hearing. Bona fides in development, along with existence of a present demand and other factors, is necessary to validate sand and gravel claims such as these and, in its absence, the claims are not valid. Foster v. Seaton, supra; United States v. Reed H. Parkinson, A-28144 (February 1, 1960); United States v. Thomas R. Shuck et al., A-27965 (February 2, 1960), affirmed, Shuck v. Helmandollar, Civil No. 682 Pct., D. C. Arizona, December 7, 1961.

In addition to the general defects arising from their failure to market any products from their claims, the evidence offered by the contestees is unpersuasive on several particular points. Of their witnesses who testified that there would have been a market for the sand and gravel on the claims, Alvin Hitchcock merely said he knew the claims existed in 1951 (August Tr. 65). He had to rely on the Nevada Testing Laboratories Ltd's report of July 18, 1963, for his opinion of the quality and quantity of material on the claims (August Tr. 64). He admitted he had never investigated the possibility of obtaining sand and gravel from the claims, although he was hauling right past them (August Tr. 65-66, 70), and that he bought only from claims offering a processed product (August Tr. 66, 70). Another witness, Thomas M. Stewart, said he inspected the claims two years before the hearing, that is, in 1961 (August Tr. 79). Although he said the sand and gravel was of good quality and accessible and testified that the concern he worked for could have used material from the area of the claims, he did not say that there had been any attempt to purchase materials from them. He, too, limited his testimony that his employer would have taken material from the claims by saying that it would have done so only if there was a producing plant there (August Tr. 80). In view of his testimony that his employer could have saved 30 miles of haulage at 10¢ a yard mile on one substantial contract (August Tr. 80, 85), the fact that there had been no offer for the material on the claims, greatly weakens his assertion that there was a market for the material from the claims prior to July 23, 1955. Contestees' third witness, Benjamin Franklin Kraft, part owner of several concerns using sand and gravel, testified that he, too, was familiar with the material on the claims but

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5/ The government witnesses found only "several bulldozer scrapes and some bladed roads on each of the claims" at the time of their examination on October 17 and 18, 1962, but that additional pits were dug between then and their second examination on June 4, 1963 (June Tr. 10-11, August Tr. 14). The appellants offered no testimony concerning development at the hearing, but in their briefs rely upon a statement of counsel (August Tr. 114) and reference to affidavits on file with the county recorder (Brief on Appeal to Director, p. 5).

did not say when he became aware of them. Darwin W. Lamb, the final witness, again failed to date his familiarity with the claims (August Tr. 100) and added nothing to the earlier testimony.

A careful review of the evidence offered by the claimants reveals little to show the condition of the claims on July 23, 1955. Loyd Ramstad, one of the claimants, did not describe any pits or workings on the claims or any other developments. Neither he nor his witnesses testified that they had ascertained the quality or quantity of the materials on the claims prior to that date. In brief, the claimants offered very little evidence to overcome the testimony of the government's witnesses that there had been no bona fides development of the claims or sales from them prior to July 23, 1955. Their evidence was in the nature of hindsight.

It is to be borne in mind that the burden of proving a discovery of a common variety of sand and gravel on the claims prior to July 23, 1955, or the discovery of an uncommon variety at any time rested on the contestees. Foster v. Seaton, supra; Osborne v. Hammitt, supra. They have clearly failed to sustain that burden.

The appellants argue that, in any event, they were justified in withholding the sale of sand and gravel from the claims because action on their application filed in September, 1954, for a license to conduct a sand and gravel operation on the claims was deferred by the County Commissioners on the ground that an exchange application had been filed under section 8 of the Taylor Grazing Act, as amended, 49 Stat. 1976 (1936), as amended, 43 U.S.C. § 315g (1964), for the land in the claims. Even assuming that this occurrence is relevant, as the Bureau of Land Management decision pointed out, the fact that appellants may have been erroneously precluded from obtaining a business license does not prove that the material on the claims was marketable. Furthermore, in the absence of any evidence that the appellants sought to have the Commissioners reconsider their action or to have the exchange application disposed of, it would appear that the license was not of pressing importance to the appellants.

There remains only the allegation that the sand and gravel on the claims was not a "common variety" within the meaning of the act of July 23, 1955, supra. While most of the testimony described the sand and gravel on the claims as of the same quality as that found generally in the area, there was some evidence that it was of better quality (August Tr. 93-94). Even if it be assumed that this contention is correct, it does not help appellants, for, as the Department has held, the fact that sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are used only for the same purposes as other deposits which are widely and readily available (United States v. R. R. Henseler, Sr. et al., A-29973

(May 14, 1964)), and so long as the superior characteristics do not give them a special and distinct value.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

Ernest F. Hom
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Land Appeals